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| 7  | UNITED STATES DISTRICT COURT  |
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| 9  | CENTRAL DISTRICT OF CALIFORNIA  |
| 10 | DAVIONE M. McDOWELL, Case No. CV 13-7299 DMG (JCG)                                      |
| 11 | Petitioner,   |
| 12 | ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED                                     |
| 13 | W.L. MONTGOMERY, Warden,  STATES MAGISTRATE JUDGE AND DENYING CERTIFICATE OF            |
| 14 | ) APPEALABILITY   |
| 15 | Respondent.   |
| 16 |   |
| 17 | Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the Magistrate        |
| 18 | Judge's Report and Recommendation, Petitioner's Objections to the Report and            |
| 19 | Recommendation, and the remaining record, and has made a de novo determination.         |
| 20 | Petitioner's Objections generally reiterate the arguments made in the Petition,         |
| 21 | and lack merit for the reasons set forth in the Report and Recommendation. There is     |
| 22 | one issue, however, that warrants brief amplification here.                             |
| 23 | In his Objections, Petitioner argues that the Report and Recommendation                 |
| 24 | "ignore[s] the crucial fact" that certain surveillance footage may have been taken, not |
| 25 | near the time of the shooting, but rather a week later. (Objections at 5-6.)            |
| 26 | Petitioner is mistaken. Instead, the record indicates that video footage was taken      |
| 27 | near the time of the shooting, and a week later, investigators sought an enhanced photo |

still from that footage. (Lodg. No. 2, Reporter's Transcript ("RT"), at 681-82, 711-14,

901-904; Lodg. No. 6, California Court of Appeal Opinion, at 3, 7-8.) 1 Moreover, Petitioner's counsel raised doubts about the timing of this footage at 2 trial. (RT at 901-904.) As a rule, "[i]t is the responsibility of the jury – not the court – 3 to decide what conclusions should be drawn from evidence admitted at trial." 4 5 Coleman v. Johnson, 132 S. Ct. 2060, 2062 (2012) (per curiam) (quoting Cavazos v. Smith, 132 S. Ct. 2, 4 (2011)). Here, the jury convicted Petitioner after considering not 6 only the footage, but also the identification testimony of *four* eyewitnesses. (Lodg. 7 No. 1, Augmented Reporter's Transcript, at 64-65, 71; RT at 918, 938, 1205, 1279, 8 1294, 1297.) Hence, the Magistrate Judge correctly found that "viewing the evidence 9 in the light most favorable to the prosecution, [a] rational trier of fact could have found 10 the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 11 443 U.S. 307, 319 (1979). 12 Accordingly, IT IS ORDERED THAT: 13 1. The Report and Recommendation is approved and accepted; 14 2. Judgment be entered denying the Petition and dismissing this action with 15 prejudice; and 16 3. The Clerk serve copies of this Order on the parties. 17 Additionally, for the reasons set forth above and in the Report and 18 Recommendation, the Court finds that Petitioner has not made a substantial showing of 19 20 the denial of a constitutional right. See 28 U.S.C. § 2253; Fed. R. App. P. 22(b); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). Thus, the Court declines to issue a 21 certificate of appealability. 22 23 DATED: November 24, 2014 24 Dolla m 25 26 UNITED STATES DISTRICT JUDGE 27

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